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Before the

Federal Communications Commission

Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Reexamination of the Comparative)
Standards for Noncommercial Educational)
Applicants)
)
Association of America's Public Television)
Stations' Motion for Stay of Low Power)
Television Auction (No. 81)

MM Docket No. 95-31

To: The Commission

JOINT COMMENTS BY THE MOODY BIBLE INSTITUTE OF CHICAGO,
HOUSTON CHRISTIAN BROADCASTERS, INC.,
AUGUSTA RADIO FELLOWSHIP INSTITUTE, INC.,
THE SISTER SHERRY LYNN FOUNDATION, INC.,
AND THE PRAISE NETWORK, INC.

The Moody Bible Institute of Chicago¹, Houston Christian Broadcasters, Inc.²,

Augusta Radio Fellowship Institute, Inc.³, The Sister Sherry Lynn Foundation, Inc.⁴ and

¹ The Moody Bible Institute of Chicago is the Commission licensee/permittee of the following noncommercial broadcast stations (stations operating on frequencies that are not reserved for noncommercial use are designated with *):

- | | |
|-------------------------------|-------------------------|
| *WMBI(AM)-#65972 & FM-#66063 | Chicago, Illinois |
| *WCRF(FM)-#66101 | Cleveland, Ohio |
| *WDLM(AM)-#66005 & FM-#43691 | East Moline, Illinois |
| *WAFS(AM)-#65976 | Atlanta, Georgia |
| WMBW(FM)-#66021 | Chattanooga, Tennessee |
| WJCG(FM)-#43708 | Monee, Illinois |
| *KMBI(AM)-#65985 & *FM-#66099 | Spokane, Washington |
| WRMB(FM)-#43686 | Boynton Beach, Florida |
| WMBV(FM)-#43690 | Dixon's Mills, Alabama |
| WGNB(FM)-#18425 | Zeeland, Michigan |
| WJSO(FM)-#43693 | Pikeville, Kentucky |
| WMKW(FM)-#65986 | Crossville, Tennessee |
| WVMS(FM)-#43701 | Sandusky, Ohio |
| WMBU(FM)-#9926 | Forest, Mississippi |
| WFCM-FM-#66111 | Murfreesboro, Tennessee |

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|-----------------------------|--------------------------|
| KSPL(FM)-#5185 | Kalispell, Montana |
| WVMN(FM)-#43698 | New Castle, Pennsylvania |
| KMBY(FM)-#9858 | Keokuk, Iowa |
| KMLW(FM)-#43702 | Moses Lake, Washington |
| WKES(FM)-#19871 | Lakeland, Florida |
| *WFCM(AM)-#58737 | Smyrna, Tennessee |
| WIWC(FM)-#43695 | Kokomo, Indiana |
| WHPL(FM)-#70476 | West Lafayette, Indiana |
| *WGNR(AM)-#2214 & *FM-#2215 | Anderson, IN |
| WSOR(FM)-#61506 | Naples, Florida |
| WMBL(FM)-#84103 | Mitchell, Indiana |
| KMBN(FM)-#82482, | Las Cruces, New Mexico |
| WKZM(FM)-#11037 | Sarasota, Florida |
| WVME(FM)-#88021 | Meadville, Pennsylvania |
| KMBN(FM)-#82482 | Las Cruces, New Mexico |
| WVML(FM)-#85908 | Millersburg, Ohio |

Moody is the licensee/permittee of a number of noncommercial FM translators. These include:

| | |
|---------------------------------|--------------------------------|
| K213BQ Nash, North Dakota | K204CE Clifton, Arizona |
| W219AZ Gallipolis, Ohio | W212AD Okeechobee, Florida |
| K204CA Tahlequah, Oklahoma | *W263AH Fort Pierce, Florida |
| K214BH Gettysburg, South Dakota | *K272BF Cavalier, North Dakota |
| K220EO Hilo, Hawaii | K212BH Pierre, South Dakota |
| W211AQ Freeport, Illinois | W218AM Dyersburg, Tennessee |
| K216CI Jackson, Wyoming | W210AV Mitchell, Indiana |
| W220AY Brattleboro, Vermont | W209AU Galena, Illinois |
| W214AP Johnson City, Tennessee | W202AV White Hall, Illinois |
| K219AZ Hope, Arkansas | K213CL Huron, South Dakota |
| K205DP Winnemucca, Nevada | |

² Houston Christian Broadcasters, Inc. is the Commission licensee/permittee of noncommercial, educational broadcast stations *KHCB(AM), Galveston, Texas (ID#27703), *KHCB-FM, Houston, Texas (ID #27702), *KHCH(AM), Huntsville, Texas (ID #30274), KKER(FM), Kerrville, Texas (ID #83433), *KHTA(FM), Wake Village, Texas (ID #87371), KANJ(FM), Giddings, Texas (ID #72440), *KHCL(FM), Arcadia, Louisiana (ID #84058), KHKV(FM), Kerrville, Texas (ID # 84182), KBCV(FM), Paris, Texas (ID #86791) and a new noncommercial FM station at Jefferson, Texas, 960920ME. HCBI is the licensee of noncommercial FM translators *K265DH, Bryan, Texas (ID #27704), and K203CX (ID #83024) San Marcos, Texas. Stations operating on nonreserved channels are designated with *.

³ Augusta Radio Fellowship Institute, Inc. is the FCC licensee of the following noncommercial FM broadcast stations: #3236-WLPE(FM), Augusta, Georgia; #23953-WLPT(FM), Jesup, Georgia; #23950-WGPH(FM), Vidalia, Georgia; #3229-WPWB(FM), Byron, Georgia; #9083-WLPG(FM) Florence, South Carolina; and WJDS(FM), Sparta, Georgia; #92979. Augusta is the licensee/permittee of FM translator stations #3228-W244AY*, Myrtle Beach, South Carolina; #3234-W224AQ*, Millen, Georgia; #84045-W250AH*, Moultrie, Georgia; #86300-W235AF*, Saluda, South Carolina; #86298-W255AK*, Atlantic Beach, South Carolina; #86421-W246AO*, Barnwell, South Carolina; #88011-W275AH*, Maxton, North Carolina; and #85699-W234AK*, Washington, Georgia. Stations operating on nonreserved channels are designated with a *.

The Praise Network, Inc.⁵, (hereafter referred to as the “Joint Parties”) by their undersigned counsel, hereby respectfully submit these Joint Comments in response to the *Second Further Notice of Proposed Rulemaking*, FCC 02-44, released on February 25, 2002 (hereafter the “Notice”).

I. INTRODUCTION.

1. The Notice seeks input on creating the procedures that will be used to issue licenses on nonreserved broadcast frequencies for which both commercial and noncommercial educational applications are submitted to the Commission. The Commission’s previous attempt to resolve this problem, by requiring both commercial and noncommercial applicants to submit to an auction process, was vacated by the United States Court of Appeals for the D. C. Circuit as in clear conflict with the Communications Act of 1934, as amended. *See, National Public Radio v. FCC*, 254 F3d 226 (D.C. Cir. 2001). The Joint Petitioners are submitting a relative easy procedure that the Commission may use to choose among and between conflicting commercial and noncommercial applications for nonreserved channels, and one that not only complies with the Communications Act, but actually furthers the primary directive of the Act, i.e.

⁴ The Sister Sherry Lynn Foundation is the licensee of noncommercial FM station KFXT(FM), #60510, Sulphur, Oklahoma.

⁵ The Praise Network, Inc. is the licensee of noncommercial, educational stations KGCR(FM)*, #24714, Goodland, Kansas; KPRD(FM), #66273, Hays, Kansas; KPNO(FM), #66272, Norfolk, Nebraska; and KGRD(FM), # 66274, Orchard, Nebraska. It is the licensee of noncommercial FM translator stations K203DL, #122132, Cheyenne Wells, Colorado; K205CCU, #82283, Burwell, Nebraska; K217CT, #86504, Ainsworth, Nebraska; *K222AL, #86756, Platte, South Dakota; and K216ED, #90814, Phillipsburg, Kansas. Stations operating on nonreserved channels are designated with a *.

to ensure the most fair and efficient use of available broadcast spectrum. *See*, 47 U.S.C. Section 307(b).

II. THE THREE "OPTIONS" PROPOSED IN THE NOTICE ARE NOT PROCEDURES THAT MAY BE IMPLEMENTED UNDER THE COMMUNICATIONS ACT, AND THE IMPLEMENTATION OF ANY ONE, OR ALL, THEREOF WOULD RESULT IN NONCOMMERCIAL EDUCATIONAL BROADCASTERS BEING UNLAWFULLY AND UNFAIRLY DENIED THEIR RIGHT TO OPERATE STATIONS IN THE NONRESERVED PORTION OF THE BROADCAST SPECTRUM.

2. The Notice sets forth three (3) so-called "options" that the Commission suggests could be used in choosing between commercial and noncommercial educational applicants for nonreserved broadcast frequencies. However, any attempted implementation of any one, or all, of these "options" would violate the statutory authority granted to the Commission under the Communications Act of 1934, as amended, which vests in the Commission its sole authority to promulgate rules, regulations and policies governing the broadcast spectrum. In addition, the implementation of any one, or all, of these three options would impact disparately and unfairly on noncommercial, educational broadcasters, and would undoubtedly result in another rebuke of the Commission for acting in an arbitrary, capricious, and illegal manner by the U.S. Court of Appeals for the District of Columbia Circuit.

A. OPTION #1: HOLD NCE ENTITIES INELIGIBLE FOR LICENSES FOR NON-RESERVED CHANNELS AND FREQUENCIES.

3. The Commission's Notice proposes an outright exclusion of noncommercial educational broadcast applicants from seeking to utilize nonreserved broadcast frequencies. The Commission notes, in glaring understatement, that "such an option

would be a departure from current policy.” Not only would such an action be a significant “departure from current policy”, but the Commission would be acting in a manner that is not authorized in the Communications Act of 1934, as amended.

4. The Commission first reserved a portion of the broadcast spectrum for noncommercial, educational use in 1938.⁶ That action, and subsequent related actions by the Commission in licensing television and AM broadcast stations for noncommercial use, was in direct response to the Congressional mandate that certain broadcast frequencies be allocated specifically for noncommercial, educational use. The Communications Act of 1934, as amended, does not include any authority for the Commission to set aside a portion of the broadcast spectrum, either AM, FM, or television, solely for commercial broadcast use. Without a mandate from Congress, through an amendment to the Communications Act, the FCC lacks any statutory basis or authority to limit the use of the nonreserved broadcast spectrum by commercial broadcast stations.

5. Moreover, the Joint Petitioners presently operate noncommercially licensed broadcast stations on nonreserved broadcast frequencies. Any attempt by the Commission to disqualify the Joint Petitioners from their continued operation on these nonreserved frequencies would be equally unsupported by any authority given to the Commission in the Communications Act of 1934, as amended, and will be vigorously opposed by the Joint Petitioners.

⁶ 3 *Fed. Reg.* 364 (Feb. 9, 1938).

B. OPTION #2 PERMIT NCE ENTITIES TO ACQUIRE LICENSES FOR NON-RESERVED CHANNELS AND FREQUENCIES WHEN THERE IS NO CONFLICT WITH COMMERCIAL ENTITIES.

6. As noted above in response to Option #1, the Commission lacks the statutory authority to exclude noncommercial educational broadcasters from utilizing nonreserved broadcast spectrum. The Commission's alternative approach under Option #2 is to allow NCE entities to only apply for nonreserved channels and frequencies in the event that there is no interest in those channels and frequencies by commercial entities. This "option" is nothing more than a recitation of Option #1.

7. Since the Commission implemented FM channel auctions and "windows" for the filing of applications on newly assigned FM allotments, there has never been a single case where there has not been at least one application filed for the use of a newly assigned FM allotment.⁷ Limiting NCE broadcasters to applying for only unwanted, and un-applied for, nonreserved broadcast channels and frequencies is tantamount, therefore, to excluding NCE broadcasters from applying for stations in the nonreserved portion of the broadcast band. Options # 1 and #2 are one in the same in the effect they would have on the ability of NCE broadcasters to seek the use of nonreserved broadcast spectrum. Stated differently, Option #2 offers NCE broadcasters nothing more than is offered by Option #1—an effective exclusion from the future use of the nonreserved broadcast spectrum. While the Commission's Notice implies that this alternative is

⁷ In fact, the Commission will not assign an FM or TV channel to its Table of Allotments unless the proponent of the assignment represents as part of the rule making that if the channel is assigned it will file an application to utilize the assignment. Thus, no newly assigned channel will be left unapplied for in the future.

another option, it is, in fact, one and the same as Option #1, and effectively offers NCE broadcasters nothing more.

C. OPTION # 3: PROVIDE NCE ENTITIES ADDITIONAL OPPORTUNITIES TO RESERVE CHANNELS IN THE TABLE OF ALLOTMENTS.

8. Option #3 is as illusory as Option #2 as an alternative to the outright exclusion of NCE broadcasters from the nonreserved broadcast spectrum. Option #3 suggests that the needs of NCE broadcasters for additional noncommercial, educational stations could be met by a "relaxation" of the Commission's criteria for allotting new television and FM channels throughout the United States and reserving the use thereof for noncommercial, educational stations. This option assumes that there are additional television and FM channels available for use in all areas of the United States that could be allocated for noncommercial, educational broadcasting. This is not the case. Option # 3 offers NCE entities no relief from the outright exclusion suggested in either Option #1 or Option #2.

9. Appended hereto as Exhibit 1 is the result of various engineering studies conducted by the Joint Parties' engineering consultants, Lechman & Johnson, Inc. Lechman & Johnson, Inc. studied the entire FM band in the five largest communities for which FM channels have been allocated, but for which application windows have not yet been opened by the Commission.⁸

These allotments are:

⁸ These were picked based on having the largest minimum bid figure, which is consistent with the proposed population in the service areas.

| | |
|--------------------------|------------------|
| Westley, California | FM Channel 238A |
| Satellite Beach, Florida | FM Channel 253A |
| Pacific Junction, Iowa | FM Channel 299A |
| Amherst, New York | FM Channel 221A |
| Dallas, Oregon | FM Channel 252C3 |

In each of these communities, the Lechman & Johnson, Inc. engineering studies disclosed that there are no alternative FM channels available for use, either in the reserved or nonreserved bands. Thus, relaxing the FM channel allocation rules to allow for the reservation of an alternative nonreserved channel, limited for noncommercial utilization, would be useless. In each case, denying noncommercial educational applicants the right to apply for these five FM channel allotments would effectively deny them the right to operate an FM station in any of these communities. Alternative channel allotments are only of use if there are alternative channels to allot, and in these cases there are none.

10. Lechman & Johnson, Inc. also randomly chose five states in which there are FM channels allocated, but for which application filing windows have not been opened by the Commission. See, Exhibit 2 hereto. These states are Arkansas, Illinois, Indiana, Kentucky, and Maryland. There are 26 communities within these five states with allocated, but un-applied for, FM channels. Lechman & Johnson, Inc. ran engineering studies on the entire FM band to ascertain whether there were any alternative FM channels, either reserved band or nonreserved band, available for use in each of these 26 communities. In only three (3) cases could an alternative FM channel be found for potential noncommercial, educational assignments under a hypothetical "relaxed"

Commission criteria. In these three cases, the communities are all highly rural areas with very little population.⁹ Thus, under the Commission's proposed Option # 3, noncommercial educational applicants would be excluded from seeking NCE stations utilizing 23 of the 26 FM assignments in these communities, and would be left only to seek noncommercial stations in the most rural and sparsely populated areas. Simply stated, NCE entities would be left with the population "dregs" of the FM channel spectrum under Option # 3, and would be precluded from seeking channels in the most heavily populated areas in which there are vacant, nonreserved frequencies. As in the cases of Options # 1 and # 2, excluding NCE entities would not only be contrary to the Communications Act, but would be inherently unfair and contrary to the public interest.

III. THE JOINT PETITIONER'S PROPOSAL.

11. The Joint Petitioners believe that there is an easily workable procedure that complies with the requirements of the Communications Act, the needs of the public for additional broadcast services, and common sense. Moreover, the ultimate decisional processes are presently implemented as part of the Commission's current broadcast application procedures for dealing with competing commercial and noncommercial broadcast applications.

12. The Commission should open windows for applications proposing to utilize nonreserved broadcast spectrum according to its current policy. Such windows should

⁹ Colchester, Illinois; Watseka, Illinois; and Calico Park, Arkansas.

be opened for applications by both commercial and noncommercial applicants who wish to use the nonreserved spectrum. Should the individual windows attract only commercial applicants, the Commission can decide among and between the applicants pursuant to its competitive bidding procedures. *See, Implementation of Section 309(j) of the Communications Act-Competitive Bidding for Commercial Broadcast and Instructional fixed Services, MM Docket No. 97-234, 14 FCC Rcd 8724, (1999).* In the event the only applicants are NCE entities, the Commission can decide among and between them through the use of its "point system." *See, Reexamination of the Policy Statement on Comparative Broadcast Hearings, GC Docket No. 92-52, 15 FCC Rcd 7386(2000).*

13. In the cases in which there are both commercial and noncommercial applications filed in response to a window, the Commission should implement a simple, three-step process. The first step is to ascertain the number of same-service broadcast signals that serve the service area of the newly proposed station. The Commission should plot the proposed interference-free contour of the proposed station. It should then plot the various same-service interference free contours of existing stations that intersect with the service area of the proposed station. This would result in a map of the interference free contour of the proposed new station and the contours of all existing stations in the same broadcast service that provide service within the proposed new station's contour.

14. The next step is to ascertain the number of stations that provide service in the new station's service area that are noncommercially licensed, and the number that are

commercially licensed. In the event that the proposed service area for the new station is served by a greater number of commercial stations than noncommercial stations, there would be a presumption that there is a greater need for a new noncommercial station than for a new commercial station. If the opposite is true, than there would be a presumption that there is a greater need for a new commercial station than for a new noncommercial station.¹⁰

15. Appended hereto as Exhibit 3 are two maps that illustrate this analysis. Figure 1 shows the hypothetical 60 dBu contour of a station operating from the reference coordinates for a hypothetical, vacant FM allotment, for which both noncommercial and commercial applications have been filed pursuant to a window. The red contour arcs represent the 60 dBu contours of existing commercial FM stations that provide service within the 60 dBu contour of the proposed FM station that is the subject of the mixed commercial-noncommercial applications. The green contour arcs represent the 60 dBu contours of noncommercial FM stations that provide service within the 60 dBu contours of the proposed FM station. In this case, there is greater service within the proposed 60 dBu contour for the new station from existing commercial stations than from existing noncommercial stations. The Commission would, therefore, dismiss the commercial applications for this vacant FM allotment and

¹⁰ In the unlikely event that there were an equal number of commercial and noncommercial services available in the proposed service area, a more exact determination of the actual population served by the stations in each service could be undertaken, with the preference being given to the service, commercial or noncommercial, reaching the fewest number of persons.

decide among and between the noncommercial applications based on its NCE point system criteria.

16. Figure 2 depicts the opposite situation. Here, there are a greater number of existing noncommercial stations providing service within the proposed 60 dBu contour of the new FM station than existing commercial stations providing service. In this case, there is presumptively a greater need for a new commercial FM station. The Commission would dismiss the noncommercial applications for this vacant FM allotment and decide among and between the commercial applicants based on its auction process. If the event there were only one commercial applicant, the winning bid would be the minimum bid amount specified in the order opening the allotment for applications.¹¹

17. Unlike the three options proposed by the Commission, this procedure is consistent with the requirements of the Communications Act of 1934, as amended.

Section 307(b) provides that:

(b) Allocation of facilities

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.¹²

Under the procedures proposed by the Joint Petitioners, the Commission would be making an initial determination of whether the licensing of a commercial or

¹¹ The same procedure would work for television allotments and could be tailored to work for AM applications through the use of service provided to the common .5 mV/m contours of the AM applications.

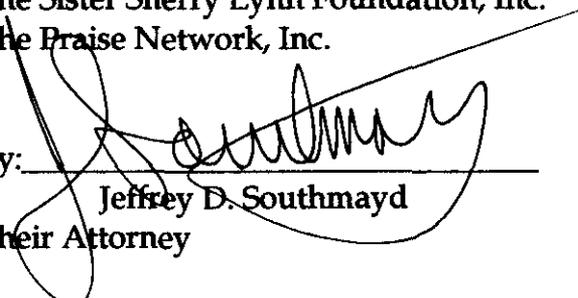
¹² 47 U.S.C. 307(b).

noncommercial station better furthers the requirements of Section 307(b) of providing a “fair, efficient, and equitable distribution of radio service” by ascertaining whether there is a greater need for one type of service or the other. Once such a determination is made based on the provision of service by existing commercial and noncommercial stations, the Commission may reasonably conclude which service should be preferred, and decide among competing applicants within each type of service pursuant to its existing procedures—either auction or point system— for competing applications in that service.

WHEREFORE, the Joint Petitioners respectfully submitted these comments in response to the *Second Further Notice of Proposed Rulemaking*, FCC 02-44, released on February 25, 2002.

Respectfully submitted,

The Moody Bible Institute of Chicago
Houston Christian Broadcasters, Inc.
Augusta Radio Fellowship Institute, Inc.
The Sister Sherry Lynn Foundation, Inc.
The Praise Network, Inc.

By: 

Jeffrey D. Southmayd

Their Attorney

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Date: April 15, 2002

EXHIBIT 3

DECLARATION
ENGINEERING STATEMENT

Peter W. Lechman says that he is an engineer and President of Lechman & Johnson, Inc., Telecommunications Consultants, with offices located at 9089 Shady Grove Court, Gaithersburg, Maryland 20877. I have in excess of 30 years experience in communications engineering, and my qualifications are a matter of record with the Federal Communications Commission.

The firm of Lechman & Johnson, Inc. has prepared technical exhibits for the JOINT PETITIONERS filing comments with the Commission relating to the licensing of commercial FM channels to non commercial educational broadcasters.

From the FCC-published list of approximately 350 pending allocations, the Affiant chose five channels that required a \$200,000 opening bid for an auction. EXHIBIT 1 is a list of the chosen five cities showing the allotted channel and a summary of other available FM channels that could be assigned to the same community. For comparison, further studies were undertaken which shows there are no non commercial channels available in the reserved spectrum for the non commercial broadcaster.

EXHIBIT 1-1 through 1-5, excluding 1-4, depicts the allocated FM assignment on a map using the FCC's listed coordinates for the proposed transmitter site. These exhibits were generated to show the impact Channel 6 Rules have on allocating channels in the reserved band. Facilities were compiled as to its classification (ERP/HAAT) and the 70 dBu and 60 dBu contours were generated and shown thereon. TV Channel 6, Grade B (47 dBu) contour shows the impact that Section 73.525 of the Rules as in licensing further reserved channels. These exhibits support the finding in EXHIBIT 1.

The Affiant chose five states from the Commission's list to demonstrate the seriousness of channel availability beyond the allocated channels. The column described as PRESENT is a list of all FM assignments to that community. Commercial channel studies were performed for each community listed under CITY/STATE and recorded in the AVAILABLE column. As shown in this column, of the 26 communities, only 3 single channels were found to work.

FIGURE 1 and 2 is a white paper map showing a typical FM channel's proposed 60 dBu contour and the 60 dBu contours from hypothetical commercial and non commercial stations.

Lechman & Johnson, Inc.

DECLARATION

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I declare under the penalty of perjury that the foregoing is true and correct.

LECHMAN & JOHNSON, INC.

A handwritten signature in black ink, appearing to read "Peter W. Lechman", written over a horizontal line.

Peter W. Lechman
Consulting Engineer
April 15, 2002

Lechman & Johnson, Inc.

EXHIBIT 1

SELECTION OF COMMERCIAL FM CHANNEL ALLOCATIONS WITH STARTING BIDS OF \$200,000

| | <u>CITY/STATE</u> | <u>ALLOCATION</u> | <u>OTHER AVAILABLE FM CHANNELS</u> |
|----|---|-------------------|--|
| 1. | WESTLEY, CA 37-28-13/121-11-14 KVIE-TV, Ch. 6, Sacramento, CA | 238A | None NCE-None |
| 2. | SATELLITE BEACH, FL 28-10-24/80-36-12 WKMG-TV, Ch. 6, Orlando, FL | 253A | None NCE-None |
| 3. | PACIFIC JUNCTION, IA 41-03-25/95-46-50 WOWT-TV, Ch. 6, Omaha, NE | 299A | None NCE-None |
| 4. | AMHERST, NY 42-58-42/78-48-00 Channel 6 - None | 221A | None NCE-None |
| 5. | DALLAS, OR 44-55-06/123-19-00 KOIN-TV, Ch. 6, Portland, OR | 252C3 | None NCE-None |

NOTE: None represents that there are no commercial FM channels available. NCE-None represents channel studies were performed and found that either Channel 6 excluded an assignment or Section 73.509 of the Rules would not technically work as an equivalent channel.

Lechman & Johnson, Inc.